

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of :
 :
Federal-State Joint Board on : WC Docket Nos. 09-197, 03-109
Universal Service :
 :
TracFone Wireless, Inc. :
Petition for Declaratory Ruling :

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER
ADVOCATES**

I. INTRODUCTION

By Public Notice released December 8, 2010, the Federal Communications Commission (“FCC” or “Commission”) put out for public comment TracFone Wireless, Inc.’s (“TracFone’s”) petition for declaratory ruling regarding specific eligible telecommunications carrier (“ETC”) designation and Link-Up support issues. In its Petition, TracFone requests that the FCC issue a declaratory ruling to confirm TracFone’s position that:

- (1) an Eligible Telecommunications Carrier (“ETC”) may not receive reimbursement from the federal Universal Service Fund (“USF”) for providing Link-Up benefits unless the ETC has and routinely imposes on its customers a customary charge for commencing telecommunications service;
- (2) a wireline ETC may not expand its USF-supported services to include wireless service without obtaining approval from the proper authority; and

(3) to be designated as an ETC in a particular state, a carrier must use some of its own facilities to provide USF-supported within the carrier's service area within that state.¹

The National Association of State Utility Consumer Advocates ("NASUCA")² agrees with TracFone's concern that universal service support for low-income consumers should be carefully managed. However, a declaratory ruling may not be the appropriate way to address the concerns identified by TracFone. The statutory universal service policy goal of Section 254(b) has remained unchanged since 1996.³ But how affordable voice service may be provisioned to low-income consumers has changed – we now have prepaid/"free" wireless service – and how states and the FCC review petitions for ETC designation has changed – we now have "Lifeline-only" ETC designations, most often sought by the providers of that wireless service.⁴ NASUCA agrees with the Public Utility Commission of Ohio ("PUCO") and AT&T, Inc. ("AT&T") that, contrary to TracFone's request, the FCC should address the ETC designation, wireless facilities, and Link-Up support issues more broadly, such as through an upcoming rulemaking.⁵

In the interim, NASUCA notes that protective measures are available to guard against or respond to particular abuses. The risk of denial of universal service support by the Universal Service Administrative Company ("USAC") for services already provided

¹ TracFone Wireless, Inc. Petition for Declaratory Ruling at 2 (filed Dec. 1, 2010).

² NASUCA is a voluntary, national association of consumer advocates in more than 40 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

³ 47 U.S.C. §254(b).

⁴ See, NASUCA Resolution 2010-02, Calling for Reform of the Lifeline Program, Including Prepaid Wireless Lifeline Services, available at <http://www.nasuca.org/archive/res/index.resolutions.php#tele>.

⁵ See PUCO Comments at 2-10; AT&T Comments at 2.

should be a strong deterrent.⁶ Close scrutiny by state commissions of the factual support and credibility of carriers requesting ETC designation also safeguards the universal service fund (“USF”).⁷ Continued monitoring of the Lifeline and Link-Up services offered by an ETC, to assure that the universal service support continues to purchase real value for both the recipient low-income consumer and the contributing public is important, as noted by the PUCO. As recommended by AT&T and PUCO, investigation⁸ and enforcement action⁹ against individual carriers or ETCs is another protection.

Even while these protections and tools are available today, the conceptual guideposts that regulators and enforcement actions depend upon, such as what comprises “own facilities” or “customary charge” need to be reexamined and updated to address today’s marketplace. NASUCA supports the recommendation of the Federal-State Joint Board on Universal Service (“Joint Board”) that the Commission develop a record and

⁶ See, e.g., *In Re: Petition for Declaratory Ruling and Nunc Pro Tunc Designation of Nexus Communications as an Eligible Telecommunications Carrier to Offer Wireless Service in Tennessee*, Docket No. 10-00083, Order Refusing Issuance of Declaratory Order at 4, fn. 16 (T.R.A. Aug. 2, 2010) (USAC gave Nexus notice that disbursement of subsidies would be discontinued and that USAC might seek reimbursement of prior payments for unauthorized services) (“*Tennessee Nexus Order*”). See <http://www.state.tn.us/tra/orders/2010/1000083au.pdf>.

⁷ See, e.g., *Swiftel, LLC Amended Petition for Designation as Eligible Telecommunications Carrier (ETC)*, Fl. P.S.C. Docket No. 070348-TX, Memorandum (June 4, 2009). Florida staff recommended against designation of Swiftel. Swiftel planned to purchase sessions initiated protocol (“SIP”) service to meet the facilities requirement of Section 54.201(d)(1), 47 C.F.R. § 54.201(d)(1). Staff did not accept SIP service as facilities or a physical component of the telecommunications network. Swiftel withdrew its petition on July 21, 2009. See <http://www.floridapsc.com/dockets/cms/docketFilings3.aspx?docket=070348>. See also, *In Re: Application of LifeConnex Telecom, LLC for Designation as an Eligible Telecommunications Carrier*, S.C. P.S.C. Docket No. 2009-414-C, Office of Regulatory Staff’s Motion to Dismiss (July 7, 2010). The S.C. Office of Regulatory Staff noted the changeability of Lifeconnex’s plan to offer facilities-based service and that Lifeconnex’s most recent business plan did not meet Section 54.201(d)(1), 47 C.F.R. § 54.201(d)(1). Lifeconnex withdrew its application without prejudice on August 4, 2010. See <http://dms.psc.sc.gov/dockets/dockets.cfc?Method=DocketDetail&DocketID=108864>.

⁸ See, e.g., *In re: Investigation of Associated Telecommunications Management Services, LLC (ATMS) companies for compliance with Chapter 25-24, F.A.C., and applicable lifeline and eligible telecommunications carrier and universal service requirements*, Fl. P.S.C. Docket No. 100340-TP, docket opened June 10, 2010.

⁹ See, e.g. *VCI Company*, Notice of Apparent Liability for Forfeiture and Order, 22 FCC Rcd 15933 (2007) (forfeiture imposed for duplicate claims for Lifeline reimbursement).

address issues arising from the entry of prepaid wireless carriers as providers of wireless service to eligible consumers with Lifeline support.¹⁰ As addressed below, other issues related to ETC designation and Link-Up also require examination, whether through a rulemaking or as part of the Joint Board’s recommended proceeding.

II. REPLY COMMENTS

A. What Constitutes “Own Facilities” Within The Meaning Of Section 214(e) of the 1996 Telecom Act

TracFone has requested that the Commission declare that carriers seeking to meet the “own facilities” requirement of Section 214(e) “must use some of its own facilities to provide USF-supported within the carrier’s service area within that state.”¹¹ NASUCA notes that TracFone’s position is at odds with the Commission’s recently stated preference for a “flexible approach that meets the goals of universal service” as opposed to “a formalistic definition of what constitutes a carrier’s ‘own facilities’ under section 214(e)....”¹²

Nonetheless, NASUCA agrees with TracFone and PUCO¹³ that clarification as to what constitutes “own facilities” under the statute is needed.¹⁴ At present, a claim to

¹⁰ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision (rel. Nov. 4, 2010), ¶¶79-83 (“*Joint Board R.D.*”).

¹¹ TracFone Petition at 12-18; see 47 U.S.C. §214(e)(1)(A).

¹² *Virgin Mobile USA, L.P. Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A); Petitions for Designation as an Eligible Telecommunications Carrier in the States of New York, North Carolina, Pennsylvania, Tennessee and Virginia*, CC Docket No. 96-45, Order (rel. Dec. 29, 2010), ¶ 16.

¹³ PUCO Comments at 8-10.

¹⁴ NASUCA notes that GreatCall, Inc. filed nine petitions for designation by the FCC as an ETC to offer wireless Lifeline and Link-Up in September 2010. See *Public Notice*, Comment Sought on GreatCall, Inc.’s Petition for Limited Designation as an Eligible Telecommunications Carrier in Alabama, et al, WC Docket No. 09-197 (rel. Oct. 1, 2010). According to GreatCall, it satisfies the “own facilities” requirement of Section 214(e) through a combination of its own facilities, which provide operator services and directory assistance, coupled with resale of Verizon Wireless services. *In the Matter of Telecommunications Carriers Eligible to Receive Federal Universal Service Support, GreatCall, Inc. Petition for Designation*, Reply Comments of GreatCall, Inc. at 2-3. NASUCA submits that the facilities must be more than

facilities-based status may suggest an easier path to designation as an ETC to offer Lifeline and Link-Up, since carriers without facilities must request forbearance by the Commission of the Section 214(e) “own facilities” requirement.¹⁵ While the FCC has granted forbearance to allow pure resellers to obtain limited ETC designation to offer Lifeline, the FCC has not yet been convinced to grant forbearance to allow a wireless reseller to receive USF support to reduce the cost of customary connection charges through Link-Up.¹⁶ Yet designation as a limited Lifeline and Link-Up ETC may allow a carrier to cover a larger portion of the carrier’s costs with USF support.¹⁷ NASUCA supports clarification of what, in light of today’s networks and marketplace, comprises “own facilities,” to provide state commissions with needed guidance and to remove possible incentives for regulatory arbitrage. That is most appropriately done in a rulemaking.

incidental to the provision of the service, and must be used in the provision of local service where ETC designation is sought.

¹⁵ NASUCA notes the oddity of the Illinois Commerce Commission’s designation of PlatinumTel as a “non-facilities-based” wireless Lifeline and Link-Up ETC on November 29, 2009. See *PlatinumTel Communications LLC Application for Designation as an Eligible Telecommunications Carrier*, Docket No. 09-0269 (I.C.C. Nov. 29, 2009) (*Illinois PlatinumTel Order*). PlatinumTel did not petition the FCC for forbearance from the facilities-based requirement of Section 214(e) until July 2, 2010. In *the Matter of Federal State Joint Board, Petition for Forbearance of PlatinumTel Communications LLC*, WC Docket No. 09-197, Petition at 3 (filed July 2, 2010)(“PlatinumTel Petition”). PlatinumTel’s petition is currently pending before the FCC. The Illinois Commission appears to have mistakenly believed that PlatinumTel had already received forbearance from the FCC. See *Illinois PlatinumTel Order* at 10.

¹⁶ In its petition, PlatinumTel says it has experience as a non-facilities-based, prepaid wireless ETC offering both Lifeline and Link-Up in Illinois. PlatinumTel Petition at 3. See also, *Conexions, LLC d/b/a Conexion Wireless, Amendment to Special Low-Income ETC Petition*, WC Docket No. 09-197 (filed Jan. 5, 2011). Conexions states that it is no longer a pure wireless reseller but owns facilities to provide operator and directory assistance services. Conexions asserts that it should no longer be subject to conditions imposed by the FCC as a condition of forbearance. Conexions appears to now seek Lifeline and Link-Up designation by the FCC for certain states.

¹⁷ Nexus opposes TracFone’s petition which may force ETCs to “absorb service initiation costs by shaving their extremely limited margins....” Nexus Comments at 7.

B. How Lifeline and Link-Up Service Will Be Provisioned Bears on ETC Designation

NASUCA agrees with the PUCO¹⁸ and TracFone that a wireline ETC may not expand its USF-supported services to include wireless service without obtaining approval from the proper authority. Nexus Communications, Inc.'s ("Nexus's") opposition based on the principle of technological neutrality is misplaced.¹⁹ Whether the common carrier seeking ETC designation offers wireline or wireless service may determine whether a state commission or the FCC rules on the petition, pursuant to Section 214(e). If a state commission does not have jurisdiction to grant a wireless common carrier designation as an ETC, the state commission's jurisdiction to grant ETC designation to a wireline common carrier is no greater and cannot reasonably include a grant of authority to offer supported services through wireless service.²⁰

Further, whether the common carrier proposes to provision the supported services on a wireline or wireless basis is important to the process of reviewing the petition for ETC designation. The ability of the common carrier to offer the supported services throughout the service area may differ depending on interconnection agreements or cellular service licenses.²¹ How a common carrier might demonstrate a commitment to provide quality service as an ETC differs between wireline and wireless carriers.²² As

¹⁸ PUCO Comments at 6-8.

¹⁹ Nexus Comments at 8-12.

²⁰ See, *Tennessee Nexus Order*, fn. 5, *supra*.

²¹ See e.g., *Federal-State Joint Board on Universal Service, NEP Cellcorp, Inc. Petition to Amend Designation as an Eligible Telecommunications Carrier in the State of Pennsylvania*, CC Docket No. 96-45, *Order*, (rel. Apr. 29, 2010)(grant of expanded service area, after ETC provided new evidence of ability to provide cellular service throughout entire rural exchange).

²² For example, a wireline common carrier seeking ETC designation would have no reason to commit to comply with the Consumer Code for Wireless Service of CTIA – The Wireless Association®. Similarly, states may explicitly regulate the rates and quality of service of wireline carriers but such regulation of the carrier's wireless operations in the same state would have to be presumed from the public interest mandate of the state's ETC authority..

part of its public interest determination, the FCC noted that TracFone's offer of wireless Lifeline service would offer consumers the benefit of mobility.²³ Yet under Nexus' theory, the FCC should have ignored the wireless aspect of TracFone's proposed Lifeline service entirely. Nexus' position that the ETC designation review process must be technology-blind and that once designated, an ETC may dramatically reshape how it provisions Lifeline and Link-Up service, is unsound.

To promote and preserve universal service, as implemented through Section 214(e) and the designation of ETC process, NASUCA agrees that the FCC should affirm that a wireline ETC may not expand its USF-supported services to include wireless service without obtaining approval from the proper authority. Again, this is a proper subject for a rulemaking.

C. How to Determine What Charges Qualify for Link-Up Support

TracFone's petition requests that the Commission better define what and how to determine whether a wireless carrier's service activation charge is a customary charge and so eligible for Link-Up universal service support. A number of competitors oppose TracFone's request, including Nexus. While AT&T notes that waiver of the non-Link-Up portion of a service activation fee is not necessarily a red flag, AT&T shares TracFone's concern that Link-Up support should not be abused.²⁴ PUCO supports clarification by the FCC of "what constitutes 'wireless facilities' for purposes of Link-Up

²³ *Federal-State Joint Board on Universal Service, TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York et al.* CC Docket No. 96-45, *Order*, 23 FCC Rcd 6206 (2008) (*TracFone ETC Designation Order*), ¶ 15.

²⁴ AT&T Comments at 2-3.

reimbursement,” as well as how to assure that only customary connection charges are subject to Link-Up support.²⁵

While TracFone, Nexus and other commenters focus on whether ETC designation to receive Link-Up support provides a competitive advantage, NASUCA notes that not every new Lifeline customer qualifies for Link-Up support, even if the ETC offers Link-Up. Link-Up support advances universal service by assisting low-income consumers in obtaining and maintaining affordable telephone service. Yet a consumer’s eligibility for Link-Up support is not without limit. Section 54.411(c) states:

(c) A carrier's Link Up program *shall* allow a consumer to receive the benefit of the Link Up program for a second or subsequent time *only* for a principal place of residence with an address different from the residence address at which the Link Up assistance was provided previously.²⁶

The Commission carved out this exception in the *1997 Universal Service Order* to assist “migrant farmworkers and low-income individuals who have difficulty maintaining a permanent residence.”²⁷ Thus the ability of a low-income consumer to obtain Link-Up support more than once relates to a change in the consumer’s principal place of residence, not the consumer’s decision to switch to another carrier or to reconnect service at the same address. While much attention has been paid as to how to ensure that eligible consumers receive Lifeline support, but only one Lifeline supported connection per household,²⁸ Section 54.411(c)’s operation to restrain the need for Link-Up funding also merits examination. NASUCA is concerned that the comments of the Competitive ETC

²⁵ PUCO Comments at 2-5, 8-10.

²⁶ 47 C.F.R. § 54.411(c)(emphasis added).

²⁷ See, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd 8776 (1997) (“*1997 USF Order*”), ¶381.

²⁸ See, e.g. *Joint Board R.D.* ¶¶ 12, 13, 35.

group²⁹ and Nexus³⁰ reflect an expectation that each low-income consumer acquired equals Link-Up reimbursement to the ETC. An examination of the role of Section 54.411(c) in tempering growth in Link-Up support would appear to dovetail with the proceeding regarding prepaid wireless carriers and Lifeline and Link-Up that the Joint Board has recommended the FCC commence.

NASUCA agrees that clarification or revision of the Commission's Link-Up regulations may be also be appropriate, to better identify what wireless connection charges are or are not eligible for recovery through Link-Up.³¹ The Commission has previously recognized that wireless service activation fees are eligible for Link-Up support but not the costs of wireless handsets, which are more appropriately treated as customer premise equipment.³² Similarly, the Commission has concluded that federal universal service support will not be given to carriers to cover outreach to promote awareness of Lifeline and Link-up assistance.³³ Yet the Competitive ETC group and Nexus suggest there is a connection between their outreach efforts and ability to receive Link-Up support.³⁴ Clarification of how to determine whether an ETC's service

²⁹ See Competitive ETC Comments at 2-5.

³⁰ See generally, Nexus Comments at 4-8; Ankum/Denney Declaration ¶ 42.

³¹ Section 54.413(a) states "(a) Eligible telecommunications carriers may receive universal service support reimbursement for the revenue they forgo in reducing their customary charge for commencing telecommunications service and for providing a deferred schedule for payment of the charges assessed for commencing service for which the consumer does not pay interest, in conformity with §54.411." 47 C.F.R. § 54.413(a). A rulemaking should also address what rate of interest an ETC may claim, as the basis for a request for reimbursement.

³² See, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Twenty-Fifth Report and Order, 18 FCC Rcd 10958 (2003), ¶ 18; see also, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Twelfth Report and Order, 15 FCC Rcd 12208 (2000), ¶ 61.

³³ See, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd 8776 (1997) ("*1997 USF Order*"), ¶407.

³⁴ Competitive ETC Comments at 4, 5 ("Outreach to underserved customers ...involves real costs.... These are charges traditional setup charges recouped."); see also, Nexus Comments, Ankum/Denney Declaration ¶ 42. NASUCA notes that ETC outreach efforts are not altruistic, but rather meet a legal requirement and typically promote the wireless carrier's branded Lifeline product. See 47 U.S.C. § 214(e)(1)(B); 47 C.F.R. § 54.201(d)(2).

connection charge is “customary” and otherwise eligible for Link-Up support appears appropriate.

As to waiver of the non-Link-Up portion of a service connection charge, NASUCA agrees with AT&T³⁵ that such waivers are not necessarily suspect. States may require ETCs to further reduce the cost of establishing a connection pursuant to state authority to promote universal service. Still, the PUCO’s concern that there is a need for better information to assist in on-going monitoring has merit, so state commissions and the FCC may better discern whether the Link-Up support is in fact used to provide value to low-income consumers and the contributing public.³⁶

As to Nexus’ defense of waiver of the non-Link-Up portion of a service connection charge,³⁷ NASUCA notes that Nexus focused solely on whether the low-income consumer is better off with Link-Up and a waiver of the remainder of the service activation charge or not. Under both scenarios, Nexus assumes the USF will reimburse for Link-Up support. Since some ETCs offer Lifeline without any connection charge to the low-income customer and without Link-Up support, Nexus’ assessment is incomplete. A low-income consumer may be indifferent to a choice between wireless Lifeline with no connection fee and wireless Lifeline with Link Up and a waived connection fee, but the latter choice imposes additional costs on the universal service fund and the consumers who contribute support. The Joint Board has already recommended that the Commission develop a record to address issues arising from the advent of prepaid wireless Lifeline service.³⁸ The proceeding should be broadened to

³⁵ AT&T Comments at 3-4.

³⁶ PUCO Comments at 6-8.

³⁷ Nexus Comments at 7-8, Ankum/Denney Declaration (corrected 12/30/2010) at ¶¶ 36-39.

³⁸ *Joint Board R.D.* ¶¶ 79-83.

include consideration of the impact of service connections which are provided at no cost to the Lifeline consumer. These considerations may bear on future petitions for ETC designation to offer Link-Up and on the amount of federal universal service support needed to fund Link-Up.

III. CONCLUSION

As set forth in these Reply Comments, NASUCA agrees with TracFone and other commenters that there is a need for action by the Commission to examine and clarify certain key terms and procedures that are critical to the sound administration and functioning of the Low Income universal service support mechanism.

Respectfully submitted,

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